



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 6, 1996

Mr. Roland Castaneda  
General Counsel  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR96-1397

Dear Mr. Castaneda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 40689.

The Dallas Area Rapid Transit ("DART") has received an open records request for the following information:

- (1) All documents, etc. that pertains to the requestor;
- (2) A report of all employees who have been given a drug screen test and tested positive from December, 1991 to present;
- (3) a job description of all listed employees;
- (4) copies of all Trial Board Awards of all employees whose hearing pertained to any drug testing (including a named employee); and
- (5) all documents following Trial Board Hearings pertaining to this request.

You have provided the requestor with his personnel file in response to item (1) but assert that the remaining information is excepted from required public disclosure by section 552.101 of the Government Code. You have submitted a representative sample of the requested information for our review.<sup>1</sup>

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert, initially, that the drug test results are confidential under the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S. Section 5.08(b) of the MPA provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

While we agree that medical records created or maintained by a physician may be released only in accordance with the MPA, *see* Open Records Decision No. 598 (1991); MPA § 5.08(c), (j), none of the documents submitted to this office appear to have been created or maintained by a physician. Moreover, the requestor does not appear to be requesting the actual medical records. Consequently, it appears that the MPA is inapplicable to this open records request.

Section 552.101 also excepts information made confidential by the common-law right to privacy. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.*

This office has recognized a privacy interest in drug test results of public employees. *See* Open Records Decision Nos. 455 (1987) at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir. 1986) and 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drugs may raise privacy issues). On the other hand, the public has a legitimate interest in having access to information concerning the qualifications and performance of governmental employees, including information concerning the circumstances of disciplinary action administered against an employee. *See* Open Records Decision No. 444 (1986). However, we do not believe the public's legitimate interest in governmental employees' job performance extends to matters involving the private life of that employee. We believe that public release of the requested information may disclose information about the conduct of specific employees' private lives; the mere presence of alcohol or an illegal drug in an employee's urine is not in every case information about that employee's conduct on the job. Thus, the drug tests do not necessarily measure only information about alcohol or drug use while at work or during employment with the city.

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(Footnote continued)

Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

On the other hand, we believe that there is a legitimate public interest in the manner in which DART deals with its employees who have tested positive for alcohol or illegal drug use.

In this instance, the requestor seeks information which would identify specific individuals who tested positive for alcohol or illegal drug use and who were subsequently disciplined or placed in rehabilitation as a result of the outcome of the drug test. To preserve these individuals' common-law privacy interest, while at the same time satisfying the legitimate public interest in the manner in which DART deals with its employees who have tested positive for alcohol or illegal drug use, we conclude that DART must withhold the names of the specific employees, and any information which would tend to identify the specific employees, in each of the documents responsive to this request pursuant to section 552.101 of the Government Code as information protected from disclosure by the common-law right to privacy.<sup>2</sup> The remaining information must be released to the requestor. We have marked the information submitted to this office accordingly.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 40689

Enclosures: Marked documents

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<sup>2</sup>As noted above, item (4) of the requested information specifically includes the Trial Board Award of a named employee. With respect to this particular employee, we believe that no amount of de-identification will adequately protect this employee's common-law privacy interest. Therefore, DART may withhold information responsive to this request which relates to this employee in its entirety.